

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1114**

THE STATE OF NORTH DAKOTA,
Plaintiff-Respondent,

vs.

PHILIP J. TERNES,
Defendant-Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO
SUPREME COURT FOR STATE OF
NORTH DAKOTA**

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THE STATE OF NORTH DAKOTA,
Plaintiff-Respondent,

vs.

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Defendant-Petitioner.

**PETITION FOR WRIT OF CERTIORARI TO
SUPREME COURT FOR STATE OF
NORTH DAKOTA**

TO: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

DEFENDANT HEREIN, Philip J. Ternes, petitions for Writ of Certiorari as follows:

OPINIONS BELOW

The Supreme Court of North Dakota's order denying Petition for Rehearing was entered on November 10, 1977. The original judgment was entered on October 27, 1977 and is reported at 259 NW2d 296. (See Appendix A of this Petition for Opinion of Supreme Court and Order Denying Petition for Rehearing).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article III, Sections 1 and 2 of the Constitution of United States of America; Title 28, Section 2101(e), United States Code; and Rule 22, Subsection 1 of the Rules of the Supreme Court of the United States. The dates of the judgment and order denying petition for rehearing sought to be reviewed and the time of entry are:

1. Decision of the North Dakota Supreme Court dated October 27th, 1977.
2. Order Denying Petition for Rehearing, Supreme Court of North Dakota, dated November 10th, 1977.

QUESTION PRESENTED

1. Is North Dakota's "Dangerous Special Offender Act" Section 12.1-32-09(2)(a) unconstitutional and in violation of Article VI and Article XIV of the Constitution of the United States of America?
2. Was North Dakota's Dangerous Special Offender Act applied to this petitioner in violation of Article VI and Article XIV of the Constitution of the United States of America?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 12.1-32-09, of the North Dakota Century Code, a lengthy statute, the pertinent text of which is set forth in the Appendix, and the right to be informed of the nature and cause of the acquisition section

of Article VI of the Constitution of the United States of America and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

The Petitioner Philip J. Ternes was charged with the murder of his wife on August 31, 1976. This was a Class A felony carrying the maximum penalty of 20 years imprisonment, a fine of \$10,000 or both under North Dakota Law. On November 17, 1976 the prosecutor filed a "Notice that Defendant is a Dangerous Special Offender" which notice read as follows:

"Comes now Richard L. Schnell, the Attorney charged with the prosecution of the above named defendant, Philip J. Ternes, and pursuant to Section 12.1-32-09(3) of the NDCC hereby gives notice that he has reason to believe that the defendant, Philip J. Ternes, is a dangerous special offender who upon conviction of the offense of murder is subject to imposition of sentence under the provisions of Section 12.1-32-09(2)(a) and further states that the reason he believes Philip J. Ternes is a dangerous special offender is that Philip J. Ternes used a firearm in the commission of the offense of murder as charged in the information in the above captioned action."

The North Dakota statute at that time (it has since been changed) compelled the prosecutor to file a notice secretly. The statute said:

"In no case shall the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous

special offender be disclosed to the jury, or be disclosed, before any plea of guilty or verdict or finding of guilt, to the presiding judge without the consent of the parties."

In this case the prosecutor secretly filed the notice in a sealed envelope, in the office of the Clerk of the District Court, giving notice only to the defendant's lawyer.

The defendant's lawyer immediately responded as follows:

"I have received your 'notice that defendant is a dangerous special offender' in the Philip J. Ternes matter. I wish to advise you that I think the statute unconstitutional, arbitrary, a violation of the equal protection clause and an unlawful delegation of the legislative and judicial power to States Attorneys."

The effect of applying the dangerous special offender statute to a Class A felony under the North Dakota statute was to grant to the sentencing Judge in the case of a Class A felony, a right to impose life imprisonment rather than 20 years.

The matter proceeded to a jury trial. The trial Judge instructed the jury, as follows:

"Under the law in our state a person is guilty of manslaughter if he causes the death of another human being under circumstance which would be murder, except that he causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse shall be determined from the viewpoint of a person in his situation under the circumstances as he believes them to be. An emotional disturbance is excusable,

within the meaning of our law if it is occasioned by any provocation, event, or situation for which the offender was not culpably responsible."

The jury found the defendant guilty of manslaughter under the above instruction.

Immediately upon return of the jury verdict the prosecutor, for the first time, advised the trial Judge that he had filed the statutory notice that defendant was a dangerous special offender. The defendant objected to its application for the reasons set forth in its return. The trial court ordered briefs. The trial court held that the act was constitutional and would be considered by the Court. The trial court then proceeded to sentence the defendant to the maximum sentence allowable for manslaughter, a Class B felony, that being 10 years imprisonment and then added an additional five years under the Dangerous Special Offender Act.

No evidence of defendant's conduct was admitted in support of the applicability of the Dangerous Special Offender Act other than the fact that the crime was committed with a firearm.

The defendant appealed his conviction to the North Dakota Supreme Court specifically raising his objection to the constitutionality of the Dangerous Special Offender Act and the constitutionality of its application to him.

The North Dakota Supreme Court rejected the argument, held the statute constitutional and properly applied. A petition for rehearing, based upon a recent Sixth Circuit Court of Appeals decision construing a similar federal statute, *U. S. v. Ilacqua*, CA 6, 9/26/77, 22 CrL 2073, was similarly rejected by the North Dakota Supreme Court.

REASON FOR GRANTING WRIT

The North Dakota Special Dangerous Offender Act, as it existed at the time of this defendant's conviction allowed a court to sentence a convicted offender to an extended sentence if "the offender is especially dangerous because he used a firearm". To invoke the statute the prosecutor had to secretly file a notice specifying that the defendant is a dangerous special offender and "setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender". The statute specifically prohibited letting the Judge know.

In this case the prosecutor advised defense counsel that if the defendant were convicted of *murder* special dangerous offender status would be sought. The consequence of this was to advise the defendant's lawyer that the maximum exposure for a murder conviction would be life imprisonment. At the same time, the requirements of the Sixth and Fourteenth Amendments to the United States Constitution that a defendant be informed and that he be given due process compelled the trial Judge, to misadvise the defendant that the maximum exposure for a Class A felony murder conviction would be 20 years. As it turned out the defendant was not convicted of murder, the crime for which the notice was filed. He was convicted of a lesser included offense, manslaughter, but the trial Judge, upon learning that a special dangerous offender notice had been given, applied that act anyway and increased the sentence 5 years over and above the maximum for the crime for which this defendant was convicted by the jury. The following constitutional infirmities exist in this procedure:

1. The defendant was not accurately advised of the crime but was expressly given contradictory information by the prosecutor and judge.

2. The notice filed specified only that in the event he were convicted of murder the special status would apply. He was not in fact convicted of murder but the status was applied anyway.

3. The notice does not set forth with particularity the reason defendant would be considered a special dangerous offender other than to recite the bare words of the statute to the effect that he used a firearm.

A defendant is entitled to know, without confusion, and without inconsistent advice, the maximum penalty so that he may intelligently plead guilty, not guilty or plea bargain. He cannot know what the penalty is if he gets wildly variant information from his own attorney and the judge.

This is a new statute in North Dakota, and consequently, at the time of this case, there were no relevant precedents discussing these points. Similar federal cases, construing a similar federal statute, however, support the granting of this writ. See *U. S. v. Kelly*, 519 F.2d 251 (8th Cir. 1975) and *U. S. v. Ilacqua*, CA 6, 9/26/77, 22 CrL 2073.

For the foregoing reasons this Petition for Writ of Certiorari should be granted in the light of the conviction, which infringes upon this defendant's Sixth and Fourteenth Amendment rights.

IRVIN B. NODLAND

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APPENDIX

APPENDIX A

IN THE SUPREME COURT

State of North Dakota

Criminal No. 595

State of North Dakota,

Plaintiff and Appellee,

v.

Philip J. Ternes,

Defendant and Appellant.

**DECISION OF THE NORTH DAKOTA
SUPREME COURT**

(Filed October 27, 1977)

Appeal from the District Court of Stark County, the
Honorable Norbert J. Muggli, Judge.

CONVICTION AFFIRMED.

Opinion of the Court by Pederson, Justice.

Lundberg, Conmy, Nodland, Rosenberg, Lucas & Schulz,
Box 1398, Bismarck, for defendant and appellant; argued by
Irvin B. Nodland.

Richard L. Schnell, State's Attorney, Box 190, Mandan,
for plaintiff and appellee.

PEDERSON, Justice.

Philip J. Ternes was charged with the murder of his
wife and was convicted of manslaughter. He appeals,

contending that the trial court abused its discretion in refusing to remove a part-time police officer from the jury upon challenge for cause, and further contending that the "dangerous special offender act" was improperly applied in his sentencing. We affirm the conviction.

It is settled law in North Dakota that no error can be predicated in the overruling of a challenge for cause where the appellant has not exhausted all of his peremptory challenges. *State v. Uhler*, 32 N.D. 483, 156 N.W. 220 (1916); *State v. Lesh*, 27 N.D. 165, 145 N.W. 829 (1914). See also, *Herbert v. Northern Pacific R. Co.*, 3 Dak. 38, 13 N.W. 349 (1882), *affirmed*, 116 U.S. 642, 29 L.Ed. 755, 6 S.Ct. 590 (1886). Ternes used his final peremptory challenge in removing the prospective juror, Leroy Berger, after a challenge for cause was denied. We must therefore determine whether the denial of that challenge was within the sound discretion of the trial court. We conclude that it was.

A challenge for cause in a criminal case may be based upon actual or implied bias. Section 29-17-35, NDCC. Implied bias may be based upon any or all of the enumerated causes found in § 29-17-36, NDCC, and no others. None of the causes listed are applicable in this case, nor is their application strenuously contended. (See § 28-14-06, NDCC, for challenges in civil cases.) Section 29-17-35(2), NDCC, provides:

"The existence of a state of mind on the part of the juror, with reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially without prejudice to the substantial rights of the party challenging, and which is known in this title as actual bias."

The existence of actual bias must be determined from the voir dire examination of the prospective juror, Leroy Berger. Berger is the son of a part-time Belfield police officer. Berger testified that he had a police badge and had substituted for his father during a period of three weeks. Berger stated that he: had never been in court before, would follow the law as instructed by the judge, had never been the victim of a crime, had heard and read about the case but remembered only part of what he had heard and read, and had no reason for being particularly interested in the case.

The appellant argues that a bias or prejudice on the part of a current badge-carrying police officer should be inferred. This Court is not at liberty to expand the statutory list of causes which imply bias. The answers given by the prospective juror did not convince the trial court that Berger could not try the issue impartially.

People v. Culhane, 33 N.Y.2d 90, 350 N.Y.S.2d 381 (1973), contains an analysis of portions of the New York Code of Criminal Procedure (since repealed) which, except for provisions not related to the problem in this case, are identical to §§ 29-17-35 and 29-17-36, NDCC. In that case a venireman with fifteen years' experience as a corrections officer was challenged for cause, even though he stated that he had formed no opinion as to the guilt of two defendants charged with the felony murder of a deputy sheriff. The New York Court of Appeals emphasized that it was unable to add to the list of implied biases because of the specific statutory language. In reversing the conviction, however, the New York court noted that the corrections officer had made it quite clear that he would give less credence to the defendants' testimony "because of their status as prisoners." Thus actual bias was clearly shown by the testimony of the venireman.

The testimony of the prospective juror in the instant case does not lead us to a similar conclusion, and we find no abuse of the trial court's discretion. Nevertheless, the comment of Judge Wachtler in the *Culhane* decision appears to be an appropriate admonition for judges in this State:

"It is almost always wise for a trial court to err on the side of disqualification . . . even if a juror is wrongly but not arbitrarily excused, the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror." *People v. Culhane*, 350 N.Y.S.2d at 398, *supra*, footnote 3.

Ternes next contends that the dangerous special offender statute under which he was sentenced is either unconstitutional or was unconstitutionally applied to him. We will construe a statute so as to avoid finding it unconstitutional if it is possible to do so. *Walker v. Omdahl*, 242 N.W.2d 649 (N.D. 1976). We will presume the constitutionality of a properly enacted statute unless it is clearly shown to be violative of state or federal constitutions. *Gableman v. Hjelle*, 224 N.W.2d 379 (N.D. 1974).

The first subsection of the dangerous special offender statute describes the categories of special offenders. The second prescribes the possible sentences. The third establishes a procedure requiring the prosecutor to give notice to defendant of the intention to seek sentencing under the statute. The fourth establishes a hearing procedure which places upon the prosecutor the burden of showing that the defendant is a dangerous special offender by a preponderance of the evidence.

There is no allegation in this case that the length of the maximum sentence authorized is in any way im-

proper. The hearing procedure was specifically waived. We are asked only to decide the constitutionality of subsections 1 and 3 of § 12.1-32-09, NDCC, or to determine if they were unconstitutionally applied to Philip Ternes.

That part of § 12.1-32-09(1), NDCC, which establishes categories of special offenders applicable to this case, provides in pertinent part:

"1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender in accordance with the provisions of this section upon a finding of any one or more of the following:

. . .

"e. The offender is especially dangerous because he used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom."

The word "dangerous" is nowhere defined in this title or section.¹ Therefore we must construe the term in a reasonable manner consistent with the statute's purpose. Title 12.1, NDCC, follows, in very large part, a proposed new federal criminal code. See, however, 18 U.S.C., § 3575, which provides for increased sentence for dangerous special offenders. 18 U.S.C., § 3575(f), defines "dangerous" as follows:

"(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." [Emphasis added.]

1. Section 12.1-01-04(6), NDCC, defines dangerous weapon.

Because § 12.1-32-09, NDCC, and 18 U.S.C., § 3575, were both enacted to provide more lengthy sentences for particular offenders, and because the procedures used are essentially the same, it is logical that the word "dangerous" would mean the same in both statutes. In *United States v. Neary*, 552 F.2d 1184 (7th Cir. 1977), the court analogized § 3575(f) to a recidivist statute and noted that the concept of dangerousness is a verbalization of considerations underlying any sentencing decision. We believe it proper to construe § 12.1-32-09, NDCC, to mean that, except as hereinafter noted, the prosecutor must show that a period of confinement greater than that normally provided as a penalty for the particular offense is required to protect the public from further criminal conduct. Because of definitive language in § 12.1-32-09(1)(e), NDCC, we conclude that this showing can be made by mere proof that the defendant used a firearm, dangerous weapon, or destructive device in the commission of an offense or during the flight therefrom.

We interpret the words of the statute as establishing four categories of special offenders who may be shown to be dangerous, and one category of special offenders who are, per se, dangerous. We cannot say that the Legislature has not the power to do that.

Ternes argues that the hearing procedure is rendered pointless when the state's attorney has only to show, by a preponderance of the evidence, that a felony was committed and that a firearm was used, after having already proven the same thing at the trial beyond a reasonable doubt. A sentencing hearing under § 12.1-32-09(1)(e), NDCC, permits the court to consider matters which would not be admissible in the trial itself before a jury. Accordingly, the hearing required under § 12.1-32-09(1)(e) is not superfluous.

It was argued that if we allow the prosecutor to seek an extended term while showing only what was necessary to prove the crime, we enter the undefined areas between legitimate prosecutorial discretion and the limits imposed by due process.² *The ABA Standards Relating to the Prosecution Function and the Defense Function*, Part VI (Approved Draft, 1971), describes the role of the prosecutor in sentencing as an obligation to seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities. We are satisfied that § 12.1-32-09, NDCC, as we have construed it, does not violate Ternes' rights to due process by providing vague penalties or by allowing the prosecutor to make legislative decisions. So, *Valley Grain Dealers v. Bd. of Cty. Com'rs*, 257 N.W.2d 425, 434 (N.D. 1977). We are also satisfied that the statute, as construed, does not in other ways violate Ternes' right to equal protection. "One who attacks a statute on constitutional grounds, defended as that statute

2. These limits were reached in cases which hold unconstitutional statutes that provide different penalties for crimes which require proof of identical elements. E.g., *State v. Pirkey*, 203 Ore. 697, 281 P.2d 698 (1955); *State v. Twitchell*, 8 Utah 2d 314, 333 P.2d 1075 (1959); *Matter of Olsen v. Delmore*, 48 Wash. 2d 545, 295 P.2d 324 (1956); see also, *Berra v. United States*, 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013 (1956) (per dissent by Justice Black). Cases holding that there is no due process or equal protection violation where lesser crimes are included within greater ones are the rule, as are those holding that a prosecutor is entitled to choose between several statutes with different penalties where those statutes control similar activity, but to a different purpose or by requiring proof of different elements. *Mauney v. United States*, 454 F.2d 273 (1972); *Black v. United States*, 405 F.2d 187, cert. denied, 394 U.S. 990, 89 S.Ct. 1477, 22 L.Ed.2d 765 (1969); *Hutcherson v. United States*, 345 F.2d 964, cert. denied, 382 U.S. 894, 86 S.Ct. 188, 15 L.Ed.2d 151 (1965). Only Illinois appears to have vested an absolute discretion in the prosecutor to charge violations of a single statute as either a felony or misdemeanor. A careful dissent in *People v. McCollough*, 313 N.E.2d 462, 57 Ill.2d 440 (1974), argues that Illinois ignores precedent to do so. See also, *State v. Hagge*, 224 N.W.2d 560 (N.D. 1974).

is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." So. Valley Grain Dealers v. Bd. of Cty. Com'rs, 257 N.W.2d at 434, *supra*.

In this case Ternes has not made any showing that the statute was applied to him differently than to other defendants. He has only complained that it could have been used against him in plea bargaining. This allegation is not sufficient to raise the constitutional question.

Ternes next complains about what he calls the "weird procedure" by which § 12.1-32-09, NDCC, is to be invoked. "It is not enough to show a procedure to be unconstitutional, to say that we never have heard of it before. [Cites omitted.]" *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N.E. 812, 813 (1900). It is contended that the procedure represents an unconstitutional delegation of legislative authority to the executive branch and that no guidelines exist for the exercise of the state's attorney's discretion in deciding whether or not to file a notice under this section. We cannot accept his conclusions. The state's attorney is given discretionary authority only where the defendant fits within one of five categories specified by the Legislature. This is clearly a limitation on the discretion of the prosecutor. The determination by the prosecutor to file the notice and seek an extended sentence does not end the question. Only the judge may sentence for the extended period and he may do that only after he is satisfied that the prosecuting attorney has met the burden of proving that an extended sentence is required. Unless it clearly appears that the power delegated is legislative, it cannot be held to be an unconstitutional delegation of legislative authority. See *Anderson v. Peterson*, 78 N.D. 949, 54 N.W.2d 542, 548 (1952).

Ternes next complains that the particularity requirement of subsection 3 was not met by the notice which the state's attorney filed. We interpret the language of § 12.1-32-09(3), NDCC, as not requiring that the notice involving § 12.1-32-09(1)(e) set out with particularity the reasons why the prosecutor believes the defendant to be a dangerous special offender when the Legislature has conclusively stated that a felon who uses a firearm is a dangerous special offender. We find that *United States v. Kelly*, 519 F.2d 251 (8th Cir. 1975) has no application here. The detailed notice by the United States in that case, held to be insufficient, carefully outlined the reasons why the defendant fit within a special offender category, but neglected entirely to allege with particularity why he was dangerous. In the case before this Court, the particularity requirement was met in the statute itself. By the plain words of the statute, it is unnecessary to state precisely the charge which has been brought against the defendant. The notice that Ternes is a dangerous special offender, which was dated November 17, 1976, and was never amended, complies with the requirements of § 12.1-32-09(3) when § 12.1-32-09(1)(e) is involved.

Two additional points raised by Ternes require our comment. He argues that the statutory scheme established in § 12.1-32-09, NDCC, theoretically violates defendant's rights to due process in that (1) the judge (not knowing about the filing of the notice by the prosecutor) necessarily falsely advised the defendant of the maximum penalty, resulting in great confusion when the defense counsel (knowing that the notice had been filed) advised defendant of a potentially greater sentence; and (2) the procedure gave the state's attorney an unfair tool in plea bargaining. There is no record, but only argument presented which

indicates that either of these things occurred in this case,³ and because the 1977 Legislative Assembly removed the anomaly from the statute by allowing the judge to be advised of the notice, we need not reach these issues.

In this case the trial court briefly questioned the correctness of filing the notice, under § 12.1-32-09, in Morton County rather than Stark County where the case was tried. Ternes now argues that it was filed in the wrong court. This is a Morton County case and the filing with the clerk of the district court of Morton County was proper. The failure to forward the notice to Stark County, until after the return of the jury verdict, did not prejudice anyone and did not affect jurisdiction. *State v. Marty*, 52 N.D. 478, 203 N.W. 679 (1925).

There was no error in the trial court's refusal to remove venireman Berger for cause or in the sentencing. The conviction is affirmed.

/s/ Vernon R. Pederson

/s/ William L. Paulson

/s/ Paul M. Sand

/s/ Ralph J. Erickstad, C.J.

3. Rule 11(b)(2), NDRCrP, requires that a court advise a defendant of mandatory minimum and maximum possible punishment before accepting a plea of guilty. We have found no requirement that the court give that advice before accepting a plea of not guilty.

Criminal No. 595

State v. Ternes

VOGEL, Justice, dissenting.

I dissent from that portion of the opinion which sustains the additional sentence based upon Section 12.1-32-09, N.D.C.C., the statute authorizing additional sentence if the defendant is found to be a "dangerous special offender."

I

The statute as applied in this case, prior to the 1977 amendment, required that the trial judge not be informed (until after verdict) of the filing of the notice of the State's Attorney that he invokes the dangerous special offender statute. As appellant points out, the inevitable consequence of this is that the trial judge tells the defendant one thing—that the maximum penalty for murder is 20 years' imprisonment—and the defendant's own attorney tells him something else—that the maximum penalty is life imprisonment. No matter how conscientiously the attorney attempts to explain this, a defendant is going to doubt that his attorney knows what he is talking about, or that the judge does. It is basic law that the defendant is entitled to know what conduct is proscribed by a criminal statute [*State v. Hanson*, 256 N.W.2d 364 (N.D. 1977)], and I believe he is also entitled to know what the maximum penalty is if he pleads guilty or is found guilty.

He cannot know what the penalty is if he gets wildly variant information from his own attorney and from the judge.

The majority opinion attempts to dispose of this defect by saying that no record was presented to indicate that the conflicting statements were made by court and counsel. None was necessary.

We all know that committing magistrates and trial judges advise defendants as to the maximum penalty, and it is the duty of attorneys to do the same. The attorney for the defendant said in argument that a judge and a magistrate "advised him of what charges were against him, that being a Class A murder felony carrying a maximum penalty of 20 years," and the facts were not disputed by the State's Attorney, who said he didn't know what could be said of the argument that a defendant might believe the judge rather than his own attorney.

I have no doubt that the contradictory information was given. The defendant is entitled to know what the penalty is if he is convicted. He should not have to guess.

II

The statute provides that the State's Attorney, if he believes that the defendant is a dangerous special offender, may file a notice so stating and "setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender." The reason given in the notice filed in this case is "that Philip J. Ternes used a firearm in the commission of the offense of murder as charged in the information in the above-captioned action." This is nothing more than a statement of what the court must find as a fact before imposing additional punishment under Section 12.1-32-09, subsection 1-e. It is not a statement "setting out with particularity the reasons why" the attorney believes him to be specially dangerous.

III

Contrary to the majority opinion, which says that *United States v. Kelly*, 519 F.2d 251 (8th Cir. 1975), "has no application here," I say that it is in point and com-

pellingly persuasive. In *Kelly*, the applicable statute permitted more severe sentences if the prosecutor filed in advance of trial a notice "setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender," and if the court found (as one of several alternative possible findings) that "... a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." The prosecutor's statement invoking the statute alleged as his reason for doing so that "The defendant is dangerous within the meaning of [the Federal statute] requiring ... a period of confinement longer than that provided for the offense for which he was convicted, ... to protect the public from further criminal conduct by said defendant."

Thus, exactly as in the case before us, the prosecutor invoked the statute by alleging in the words of the statute one of the findings which the court was authorized to make in order to justify applying the statute and extending the sentence. The prosecution argued that the notice was sufficient.

The Eighth Circuit said, in language we would do well to adopt, that

"... the plain language of the act itself defeats the government's argument..." 519 F.2d at 255-256.

And,

"In sum it is not for the court to say, where the language of the statute is clear, that a legislative act may encompass a more restricted meaning. We believe that the district court correctly found the notice insufficient. Under the circumstances we need not meet the more serious challenge to the act's constitutionality." 519 F.2d at 256.

CONCLUSION

Since all the defects I have discussed relate only to sentencing, the case should be remanded for resentencing of the defendant without reference to the statute as to dangerous special offenders, which has not been properly invoked or applied in this case.

/s/ Robert Vogel

ORDER DENYING PETITION FOR REHEARING

File No. Cr. 595

STATE OF NORTH DAKOTA,)
) ss.

In the Supreme Court)

Appeal from the District Court of Stark County.

State of North Dakota,
Plaintiff and Appellee

v.

Philip J. Ternes,
Defendant and Appellant

This action coming on to be heard at the September A.D. 1977 term of this Court at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present the Honorable Ralph J. Erickstad, Chief Justice; the Honorable Wm. L. Paulson, the Honorable Robert Vogel, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, Associate Justices; and a petition for a rehearing upon the appeal herein having been filed by Irvin B. Nodland for the appellant and the court having advised thereon, it is now here considered, ordered and adjudged, that the petition be and the same is hereby DENIED.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated November 10, 1977 BY THE COURT,

/s/ Ralph J. Erickstad
Chief Justice

Attest: /s/ Luella Dunn

STATE OF NORTH DAKOTA,)
) ss.
 IN THE SUPREME COURT,)

The petition for a rehearing upon the appeal in the above entitled action is hereby DENIED.

/s/ Vernon R. Pederson

/s/ Wm. L. Paulson

/s/ Paul M. Sand

/s/ Ralph J. Erickstad, C.J.

Judges Supreme Court,
 State of North Dakota.

I would grant the rehearing.

/s/ Robert Vogel

SECTION 12.1-32-09 NORTH DAKOTA CENTURY CODE

12.1-32-09. Dangerous special offenders, extended sentences—Procedure.—1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender in accordance with the provisions of this section upon a finding of any one or more of the following:

- a. The convicted offender is a dangerous, mentally abnormal person. The court shall not make such a finding unless the presentence report, including a psychiatric examination, concludes that the offender's conduct has been characterized by persistent aggressive behavior, and that such behavior makes him a serious danger to other persons.
- b. The convicted offender is a professional criminal. the court shall not make such a finding unless the offender is an adult and the presentence report shows that the offender has substantial income or resources derived from criminal activity.
- c. The convicted offender is a persistent offender. The court shall not make such a finding unless the offender is an adult and has previously been convicted in any state or states or by the United States of two felonies of class B or above, or of one class B felony or above plus two offenses potentially punishable by imprisonment classified below class B felony, committed at different times when the offender was an adult. For the purposes of this subdivision, a felony conviction in another state or under the laws of the United States shall be considered a felony of class B or above if it is punishable by a maximum term of imprisonment of ten years or more.

- d. The offender was convicted of an offense which seriously endangered the life of another person, and the offender had previously been convicted of a similar offense.
- e. The offender is especially dangerous because he used a firearm, dangerous weapon, or destructive device in the commission of the offense or during the flight therefrom.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the offender has been pardoned on the ground of innocence shall be disregarded for purposes of subdivision c. In support of findings under subdivision b, it may be shown that the offender has had in his own name or under his control income or property not explained as derived from a source other than criminal activity. For purposes of subdivision b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the offender's declared adjusted gross income under chapter 57-38.

2. The extended sentence may be imposed in the following manner:

- a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.
- b. If the offense for which the offender is convicted is a class B felony, the court may impose a sentence

up to a maximum of imprisonment for twenty years.

- c. If the offense for which the offender is convicted is a class C felony, the court may impose a sentence up to a maximum of imprisonment for ten years.

3. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender, such attorney, at a reasonable time before trial or acceptance by the court of a plea of guilty, may sign and file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection 2, and setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender be disclosed to the jury, or be disclosed, before any plea of guilty or verdict or finding of guilt, to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

4. Upon any plea of guilty, or verdict or finding of guilt of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. Except in the most extraordinary cases, the

court shall obtain a presentence report and may receive a diagnostic testing report under subsection 4 of section 12.1-32-02 before holding a hearing under this subsection. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the prosecution at least five days prior thereto. The court shall permit the prosecution and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant shall be entitled to compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term within the limits specified in subsection 2. The court shall place in the record its findings including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

MAR 2 1978

MICHAEL RODAK, JR., CLERK

**In the Supreme Court
of the United States**

OCTOBER TERM, 1977

No. 77-1114

THE STATE OF NORTH DAKOTA

Plaintiff-Respondent,

VS.

PHILIP J. TERNES,

Defendant-Petitioner

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

The Petitioner, Philip J. Ternes, was charged with the offense of murder and convicted of the lesser included offense of manslaughter.

Under North Dakota law murder is a Class A Felony which ordinarily carries a maximum penalty of 20 years imprisonment, a fine of \$10,000 or both; manslaughter is a Class B Felony which ordinarily carries a maximum penalty of 10 years imprisonment, a fine of \$10,000 or both.

However, North Dakota also has a "Dangerous Special Offender" statute, section 12.1-32-09 NDCC. That statute is hereinafter referred to as the "Special Offender Act" and it allows a court to sentence a convicted offender to an extended sentence if the defendant is found to be a dangerous special offender within the meaning of the statute. The Special Offender Act is set out fully at A17 of Petitioner's Appendix.

Briefly, the first subsection of the act describes the categories of dangerous special offenders. The second subsection prescribes the maximum allowable extended sentences which may be imposed if the convicted offender is found to be a dangerous special offender within the meaning of the statute. The third subsection of the act provides a procedure for the prosecutor to notify the defendant that he is seeking extended sentencing under the Special Offender Act. The fourth subsection establishes a procedure which requires the prosecution to prove, by a preponderance of the evidence, that the convicted offender is a dangerous special offender within the meaning of the statute at a hearing held upon at least five days notice to the defendant.

Prior to the trial of the action, in accordance with the provisions of the act, the prosecution served a "Notice that Defendant is a Dangerous Special Offender" on Petitioner. The relevant provisions of the notice read:

"Comes now Richard L. Schnell, the Attorney charged with the prosecution of the above-named defendant, Philip J. Ternes, and pursuant to section 12.1-32-09(3) of the NDCC hereby gives notice that he has reason to believe that the defendant, Philip J. Ternes, is a dangerous special offender who upon conviction of the offense of murder is subject to imposition of sentence under the provisions of section 12.1-32-09(2) (a) and further states that the reason he believes Philip J. Ternes is a dangerous special offender is that Philip J. Ternes used a firearm in the commission of the offense of murder as charged in the information in the above-captioned action.

Thus, prior to the trial of the action, the Petitioner was informed that upon conviction the prosecution would attempt, at a later hearing, to prove that the Petitioner fit into one of the categories of dangerous special offenders described by the Special Offender Act, namely section 12.1-32-09(1) (e). That section provides that a convicted offender can be sentenced to an extended term of imprisonment under the provisions of the Special Offender Act if the court finds:

"The offender is especially dangerous because he used a firearm . . . in the commission of the offense . . ."

Although Petitioner was served with the notice that the prosecution would be seeking extended sentencing upon conviction, and the notice was filed with the Clerk of the trial court, the presiding judge was not informed of the filing of the notice and the notice was left in a sealed envelope in the office of the clerk. The reason the presiding judge was not informed of the filing of the notice was that a portion of the Special Offender Act, section 12.1-32-09(3) NDCC, which has since been amended, read:

"In no case shall the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender be disclosed to the jury, or be disclosed,

before any plea of guilty or verdict or finding of guilt, to the presiding judge without the consent of the parties."

There is no dispute that at Petitioner's arraignment he was informed that the maximum penalty for murder was 20 years imprisonment, a fine of \$10,000 or both.

The matter proceeded to jury trial and the jury returned a verdict of guilty of the lesser included offense of manslaughter.

Immediately upon the return of the verdict the prosecution informed the presiding judge that the statutory notice had been filed and the prosecution would be seeking extended sentencing under the provisions of the Special Offender Act. Petitioner immediately objected to the application of the act on grounds that the act violated Petitioner's rights under Amendments VI and XIV of the United States Constitution.

During the trial of the action Petitioner took the stand and admitted he had used a pistol in the commission of the offense. In addition, the evidence overwhelmingly indicated he had shot the victim with a pistol. Based on the trial testimony Petitioner waived the required hearing and agreed the prosecution could prove by a preponderance of the evidence that he had used a firearm in the commission of the offense.

It should be noted that Petitioner never requested a bill of particulars or made any other motion seeking to compel the prosecution to allege with particularity why the prosecution had reason to believe that he was "especially dangerous" other than the allegation that he had used a firearm in the commission of the offense.

The trial court called for briefs on the constitutionality of the Special Offender Act and after briefs were submitted heard oral argument. The court then determined that the act was constitutional and had been constitutionally applied to Petitioner and sentenced Petitioner to an extended sentence under the provisions of the act.

Petitioner perfected timely appeal to the North Dakota Supreme Court and raised the issue of the constitutionality of the act and its application to Petitioner. The North Dakota Supreme Court held the act was constitutional and had been constitutionally applied to Petitioner in *State v. Ternes*, 259 NW2d 296 (N.D. 1977), which is set out fully at A1-A14 of Petitioner's Appendix. Petitioner's petition for rehearing before the North Dakota Supreme Court was denied on November 10, 1977.

Petitioner has applied for a Writ of Certiorari to this Court alleging the Special Offender Act violated Amendments VI and XIV of the United States Constitution and that it was unconstitutionally applied to him.

Although Petitioner in the "Questions Presented" section of his Petition alleges that section 12.1-32-09(2) (a) (emphasis added) is unconstitutional, it evident from reading the total petition that he is referring to portions of section 12.1-32-09(3) NDCC.

Specifically, it appears that Petitioner is alleging:

(1) The portion of section 12.1-32-09(3) NDCC which required the prosecution to withhold the fact that it would be seeking extended sentencing under the Special Offender Act from the trial court until after a finding of guilt violated Amendments VI and XIV of the United States Constitution in that the defendant, before entering a not guilty plea to the offense charged was not correctly informed of the maximum penalty which could be imposed upon conviction;

(2) The Special Offender Act was unconstitutionally applied to Petitioner because he was not informed with sufficient particularity of the nature of the acts which the prosecution would attempt to prove at the special offender hearing; and

(3) The prosecution did not inform Petitioner that it would be seeking extended sentencing under the Special Offender Act if Petitioner was convicted of a lesser included offense.

ARGUMENT

It appears that the only substantial federal question raised by Petitioner is whether Amendments VI and XIV of the United States Constitution require the presiding judge at a criminal arraignment, upon accepting a not guilty plea, to inform a defendant that an additional penalty may be imposed upon conviction if the defendant is found to be a dangerous special offender, where statutory procedures mandate that the defendant be served with notice that extended sentencing will be sought, and after conviction the defendant has a right to a hearing on the issue of extended sentencing.

While this specific issue has not been directly addressed by this Court, it appears that the decision below is probably in accord with the applicable decisions of this Court, specifically *In re Oliver*, 333 U.S. 257.

There, at 333 U.S. 273, this Court set forth the minimum basic requirements mandated by Amendment VI.

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

It appears likely that the procedures followed in this action satisfied, in fact greatly exceeded, the minimum standards set forth above.

Petitioner has also raised the issue of lack of specificity in the "Notice that Defendant is a Dangerous Special Offender". First, it appears unlikely that defendant has preserved his right to appeal on this issue as he made no motion to compel the prosecution to allege with further particularity why the prosecution thought the defendant was a dangerous special offender. Second, this issue has been determined on independent state

grounds, the North Dakota Supreme Court having specifically found regarding special offenders armed with a firearm:

"We interpret the words of the statute as establishing four categories of special offender who may be shown to be dangerous, and one category of special offenders who are, per se, dangerous. We cannot say that the Legislature has not the power to do that. *State v. Ternes*, 259 NW2d at 299, Petitioner's Appendix at A6.

We interpret the language of § 12.1-32-09(3), NDCC as not requiring that the notice involving § 12-1-32-09(1) (e) set out with particularity the reasons why the prosecutor believes the defendant to be a dangerous special offender when the Legislature has conclusively stated that a felon who uses a firearm is a dangerous special offender. *State v. Ternes*, 259 NW2d at 300-301, Petitioner's Appendix at A9.

Defendant's last issue, that the special offender proceedings could only be invoked if the petitioner was found guilty of the offense of murder, not the lesser included offense of manslaughter has also been dealt with on independent state grounds, the North Dakota Supreme Court having found:

"In the case before this Court, the particularity requirement was met in the statute itself. By the plain words of the statute, it is unnecessary to state precisely the charge which has been brought against the defendant. The notice that Ternes is a dangerous special offender, which was dated November 17, 1976, and was never amended, complies with the requirements of § 12.1-32-09 (3) when § 12.1-32-09(1) (e) is invoked. *State v. Ternes*, 259 NW2d at 300-301, Petitioner's Appendix at A9.

CONCLUSION

For the reasons given in the Argument that it appears Petitioner's allegations of error have either been dealt with on adequate state grounds or have been decided below in conformity with applicable decisions of this Court it is respectfully requested that Petitioner's Petition for a Writ of Certiorari be, in all respects, denied.

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